Supreme Court, U.S.
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No. 00- 00 471

IN THE

Supreme Court of the United States

ALBERT KENRICK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether — contrary to precedents of at least eight circuits and the Supreme Court, legislative history, common law, constitutional principles, and commentators — an intent to harm, or to cause a loss, or its equivalent can be eliminated from the culpable mental state required to sustain a criminal fraud conviction?

2. Whether an appellate court can sustain a bank fraud conviction by finding nondisclosure of a material fact and/or a culpable mental state in the first instance where the jury was not instructed on materiality, and where the trial judge never found materiality, but held a reasonable doubt as to materiality at sentencing, commenting that "I suspect, without feeling a degree of certainty, that if there had been disclosure ... these loans, nevertheless, would have been made...."?

3. Whether *McNally v. United States*, 483 U.S. 350 (1987) and/or *Chaiarella v. United States*, 445 U.S. 222 (1979) bar a conviction for bank fraud regarding a transaction occurring before the enactment of 18 U.S.C., §1346 based on a bank officer's alleged concealment of a potential conflict of interest from the bank, where the Petitioner, as seller, had no duty to disclose, where the information furnished to the bank by the Petitioner was accurate, and where an attorney representing the bank removed the bank officer's name from documents which the Petitioner's attorney had prepared and presented?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were the United States of America, Albert Kenrick, and Derek Ober. Derek Ober is not a party to this petition and is believed to have no interest in its outcome. No corporate disclosure statement is required.

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OPINION BELOW

The August 2, 2000 en banc opinion of the United States Court of Appeals for the First Circuit in *United States v. Kenrick*, (Pet.App. 1a-27a) is reported at 221 F. 3rd 19 (1st Cir. 2000).

JURISDICTION

The judgment of the First Circuit Court of Appeals was entered on August 2, 2000. The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2 of the United States Constitution provides that "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury."

The Due Process Clause of the Fifth Amendment to the United States Constitution provides that "No person shall be ... deprived of life, liberty, or property without due process of law."

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...."

18 U.S.C., §371 punishes "two or more persons [who] conspire ... to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy."

18 U.S.C., §§1341 and 1343 punish "[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, ... for the purpose of executing such scheme or artifice or attempting to do so" uses the mails or wires.

18 U.S.C., §1344 punishes "[w]hoever knowingly executes, or attempts to execute, a scheme or artifice – (1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of a financial institution, by means of false or fraudulent pretenses, representations, or promises..."[1]

18 U.S.C., §1346, enacted by P.L. 100-690, 102 Stat. 4508 (November 18, 1988), provides that "For purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to defraud another of the intangible right of honest services."

STATEMENT OF THE CASE

On December 18, 1996, a federal grand jury issued an indictment against Albert Kenrick ("the Petitioner") and Derek Ober. The indictment arose from events which had occurred in 1986, a decade earlier. At that time, the Massachusetts real estate market was booming. Real estate investors who owned properties which had appreciated had an incentive to sell those properties before changes in the taxation of capital gains took effect on January 1, 1987. The

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[1] Although an earlier version of 18 U.S.C., §1344 applied at the time of the events underlying the conviction at issue, the differences in the statute are not significant to any issue presented.

Wakefield Cooperative Bank ("the bank") had just become insured by the Federal Deposit Insurance Corporation. Ober was the president of the bank as well as a director, a member of its security committee, and its only loan officer. The Petitioner, an established customer of the bank, owned several apartment buildings which he wanted to sell. (Pet.App. 2a, 4a, 10a).

Counts 1, 2 and 3 of the indictment charged both the Petitioner and Ober with an overarching quid-pro-quo bank bribery conspiracy (in violation of 18 U.S.C. §371) and substantive bank bribery (in violation of 18 U.S.C. §215(a)). These counts alleged that the Petitioner had sold Ober an interest in an 18 unit apartment building at 222 Stackpole Street, that Ober had concealed his interest in 222 Stackpole Street from the bank, and that, in return, Ober had caused the bank to lend money to persons who purchased three apartment buildings from the Petitioner: 222 Stackpole Street, 8-10 Emerson Street and 175 Haverhill Street. In Counts 4-6 the Petitioner and Ober were charged with substantive bank fraud (in violation of 18 U.S.C. §1344). Each bank fraud count identified a specific loan from the bank relating to one of the three apartment buildings which the Petitioner had sold. The remaining counts charged Ober alone with additional offenses which did not involve the Petitioner. (Pet.App. 10a).

The evidence at trial demonstrated that the Petitioner had made no secret of Ober's interest in the 222 Stackpole Street property. The Petitioner spoke openly of Ober's interest and made an entry in his diary that he had agreed to sell the property "to keep good rapport" with Ober. Based on information from the Petitioner, his lawyer prepared a purchase and sale agreement and forwarded the draft to an attorney who represented the bank. This document named Ober as a purchaser of the property. (Pet.App. 3a, 7a).

However, acting on instructions from Ober, the bank's attorney had Ober's name removed from the final purchase and sale agreement and prepared a real estate trust to take title to the property. Ober's stated motivation for not wanting his name to appear was that he was in the midst of a divorce. (Pet.App. 3a).

Unbeknownst to the Petitioner, Ober allegedly had funded the loan to purchase 222 Stackpole Street without seeking or obtaining approval or ratification from the bank's board of directors. Although an entry in the board minutes indicated that the board had approved the 222 Stackpole Street loan, there was evidence that the entry was not consistent with having been prepared with other entries on the same page. Three of the directors testified that the loan had not been presented and that Ober had not disclosed his interest in the property to them. (Pet.App. 4a).

Apart from Ober's alleged concealment of his interest, there was no allegation, evidence, or argument of anything false regarding the 222 Stackpole Street loan. The loan was paid in full within eight months. (Pet.App. 4a).

Soon after the Petitioner had agreed to sell Ober an interest in 222 Stackpole Street, Ober had approved loans from the bank to Chung Lee and her family so they could purchase a six family property at 8-10 Emerson Street from the Petitioner. Apart from its alleged connection to the 222 Stackpole Street sale, there was no allegation, argument, or evidence at trial of anything false or improper about the 8-10 Emerson Street loans. The loans were presented to and approved by the bank's directors in the ordinary course. The sale of 8-10 Emerson Street closed on December 18, 1986, about a week before the sale of 222 Stackpole Street closed. (Pet.App. 6a).

At the time of the 8-10 Emerson Street transaction, the Petitioner and Chung were dating. In 1988, about two years after purchasing the property, Chung married the Petitioner. Still more years later, Chung contaminated the property while attempting to remove lead paint. As a result, the tenants were forced to move out. Chung defaulted on loan payments owed to the bank and eventually declared bankruptcy. Still later, the bank foreclosed and sold the property at a loss. (Pet.App. 6a, 8a).

The jury instructions on bank bribery focused on Ober's intent to gain rather than on intent to injure or harm the bank.

> [The] motive to act corruptly is ordinarily a hope or expectation of either some sort of financial gain or other benefit to one's self [sic] or some profit or benefit for someone else.
>
> To establish that the defendant acted corruptly, the Government is not required to prove that the defendant intended to injure the bank. The Government is also not required to prove that the bank lost money as a result of the transactions for which the defendant before you is alleged to have either received bribes or offered to make bribes. In fact, it's not a defense, consequently not relevant, that the bank may actually have benefitted from the transaction. But what is critical here is for you to determine that this was something other than ordinary business.

October 24, 1997 Trial Transcript 68

The trial's focus on alleged bank bribery and Ober's allegedly wrongful gains also was reflected in the jury instructions on bank fraud:

> A scheme to defraud is ordinarily accompanied by a desire or purpose to bring about some gain or benefit to one's self [sic] or some other person or by a desire or purpose to cause a loss to some other person. Here there is not alleged – effectively, there hasn't been any evidence offered – that there was an intent to cause a loss to some other person. Here, we're dealing with allegations that there was to be some benefit to Mr. Ober, to Mr. Kenrick, or to people that Mr. Kenrick was concerned about.

(Pet.App. 12a) [emphasis added].

The trial judge also defined "intent to defraud": "To act with intent to defraud means to act wilfully with a specific intent to deceive or cheat or for the purpose of either causing some financial gain to another or one's self [sic]." There were no objections to these instructions. (Pet.App. 10a, 11a, 12a).

The jury found both the Petitioner and Ober "not guilty" of the overarching conspiracy and bank bribery charges [Counts 1-3]. The jury found the Petitioner "not guilty" of bank fraud relating to 222 Stackpole Street and 175 Haverhill Street [Counts 5 and 6].[2] The jury convicted both the Petitioner and Ober of bank fraud relating to 8-10 Emerson Street [Count 4]. (Pet.App. 1a, 19a, 21a).

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[2] Ober was convicted of bank fraud relating to 222 Stackpole Street [Count 5] and of other offenses not involving the Petitioner. (Pet.App. 19a, 24a, 25a).

In keeping with the trial's focus on bribery, neither the jury nor the trial judge ever decided whether, if there had been any nondisclosure at all, it was of a material fact. Indeed, at the time of sentencing, the trial judge held at least a reasonable doubt whether any nondisclosure was material:

> I am of the view that, all other things being equal, these loans would have been made by [the bank] at this time. And, in fact, I suspect, without feeling a degree of certainty, that if there had been disclosure by Mr. Ober concerning his interest [in the 222 Stackpole Street property], these loans, nevertheless, would have been made and that what was animating Mr. Ober in these contexts, by and large, had to do with his domestic difficulties more than misleading his directors. ... [T]hese loans seem to me to have been about par for what the bank was doing. And, in fact, they were performing loans until there was a change in the economic climate. In the case specifically of the Chung Kenrick loan, I have information suggesting that it was mismanagement further down the line by Chung Kenrick of the property and the maintenance of the property that constituted the actual cause of the loss.

January 20, 1998 Trial Transcript 32, 33.

On appeal, the original First Circuit panel found that the bank fraud instructions were erroneous because they permitted proof of an "intent to defraud" based on an intent to gain without requiring

proof of an "intent to harm" or its equivalent.[3] The panel reached this conclusion based on precedents from other circuits and *McNally v. United States*, 483 U.S. 350 (1987). The panel found the error harmless. (Pet.App. 1a-2a, 12a-13a).

On rehearing en banc the First Circuit held that these bank fraud instructions were not erroneous because an "intent to defraud" could be proven based on "an intent to deceive in order to obtain money or other property" without proof of "intent to harm." (Pet.App. 2a, 17a).

Although acknowledging that the jury's acquittals of the Petitioner and Ober of the conspiracy and bank bribery charges [Count 1-3] might be "logically inconsistent" with the convictions on the 8-10 Emerson Street bank fraud [Count 4], the First Circuit affirmed the Petitioner's conviction on the basis that the jury could have found that there had been nondisclosure of Ober's interest in a quid-pro-quo arrangement, and that this was a "material fact." (Pet.App. 22a n. 15). The First Circuit never resolved the inconsistency with *McNally*. The First Circuit never recognized the limitations of *Neder v. United States*, 527 U.S. 1 (1999). The First Circuit never addressed the absence of any finding of materiality in the trial court, or the propriety of an appellate court making such a finding in the first instance.

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[3] The intent to harm includes not only the intent to injure, to cause a loss, or to expose the victim to an unwanted risk of loss, but also circumstances where a defendant knew of the practical certainty that such harm would result. *United States v. United States Gypsum Co.*, 438 U.S. 422, 445 (1978)

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

1.A. Eliminating an intent to harm or its equivalent from the culpable mental state required for a criminal fraud conviction conflicts with at least eight other circuits which have required proof of such an intent. Supreme Court Rule 10(a).

The Second Circuit has emphatically held that "although the government is not required to prove actual injury, it must, at a minimum, prove that defendants contemplated some actual harm or injury to their victims. Only a showing of intended harm will satisfy the element of fraudulent intent." *United States v. Starr*, 816 F. 2nd 94, 98 (2nd Cir. 1987) [emphasis original], *citing, United States v. Regent Office Supply Co.*, 421 F. 2nd 1174, 1181 (2nd Cir. 1970). "Misrepresentations amounting only to a deceit are insufficient to maintain a mail or wire fraud prosecution. Instead, the deceit must be coupled with a contemplated harm to the victim." *Id.* The Second Circuit has applied this same rationale to bank fraud cases.[4] *See, e.g., United States v. Ragosta*, 970 F. 2nd 1085, 1089 (2nd Cir.), *cert. denied*, 596 U.S. 1002 (1992); *United States v. Stavroulakis*, 952 F. 2nd 686, 694 (2nd Cir. 1992).

In addition to the Second Circuit, the Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits also have required proof of an intent to harm. *See, e.g., United States v. Saks*, 964 F. 2nd 1514, 1519 n. 5 (9th Cir. 1992) (bank fraud "require[s] proof that the defendant intended to defraud or injure a bank"); *United States v. Stouffer*, 986 F. 2nd 916, 922 (5th Cir. 1993) (mail and wire fraud convictions "require[] a

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[4] Interpretations of the term "defraud" as used in one statute have been applied to other statutes. *Carpenter v. United States*, 484 U.S. 19, 25 n. 6 (1987).

showing that defendants contemplated or intended some harm to the property rights of their victims"); *United States v. Moede*, 48 F. 3rd 238, 242 (7th Cir. 1995) (evidence sufficient if "defendant intended to cause actual or potential loss to the financial institution"), *citing, Ragosta; United States v. Key*, 76 F. 3rd 350, 353 (11th Cir. 1996) ("The requisite intent for bank fraud is present if defendant's conduct was 'designed to deceive a federally chartered or insured financial institution into releasing property, with the intent to victimize the institution by exposing it to actual or potential loss.'") *quoting, Ragosta; United States v. Jain*, 93 F. 3rd 436, 442 (8th Cir. 1996) ("the essence of a scheme to defraud is an intent to harm the victim"); *United States v. Cochran*, 109 F. 3rd 660, 667-69 (10th Cir. 1997) (following *Jain*); *United States v. Frost*, 125 F. 3rd 346, 361 (6th Cir. 1997) (evidence of mail fraud insufficient because it did not "permit[] a reasonable jury to conclude that [the defendant] intended to inflict a tangible injury upon [the victim]"), *citing, Starr; United States v. Schnitzer*, 145 F. 3rd 721, 734 (5th Cir. 1998) (bank fraud conviction requires "intent to victimize [the bank] by exposing it to actual or potential loss"); *United States v. Whitehead*, 176 F. 3rd 1030, 1037 (8th Cir. 1999) ("government must show that some actual injury was contemplated by the defendant"); *United States v. Hoglund*, 178 F. 3rd 410, 413 (6th Cir. 1999) ("defendant must have intended to put a bank at a risk of loss").

The District of Columbia Circuit appears to be in accord. *United States v. Sun-Diamond Growers*, 138 F. 3rd 961, 974 (D.C. Cir. 1998) ("economic harm" must "be within the defendant's reasonable contemplation" in a private-sector honest services fraud case), *affirmed on other grounds*, 526 U.S. 398 (1999).

The First Circuit's en banc opinion abandoned its own precedent, such as *United States v. Jones*, 10

F.3d 901, 908 (1st Cir. 1993) which had quoted and relied upon the *Ragosta* and *Stavroulakis* cases from the Second Circuit and had required proof of an intent to harm.

> In order to convict [the defendant] of bank fraud under 18 U.S.C., § 1344(1), the jury had to find beyond a reasonable doubt that [the defendant] "engaged in or attempted to engage in a pattern or course of conduct designed to deceive a federally chartered or insured financial institution into releasing property, with the intent to victimize the institution by exposing it to actual or potential loss."

The Third Circuit's statement in *United States v. Goldblatt*, 813 F. 2nd 619, 624 (3rd Cir. 1987), describing an intent to defraud as an intent to deceive in order to obtain something of value, upon which the en banc First Circuit opinion relied, (Pet.App. 17a), is not and did not purport to be a comprehensive definition of intent to defraud. To the contrary, the *Goldblatt* opinion itself found that the evidence was sufficient to convict because it proved, inter alia, that Goldblatt must have known that his conduct would result in a loss to the bank. 813 F. 2nd at 622.

The Second Circuit has distinguished *Goldblatt*. On particular facts, an intent to deceive may be the functional equivalent of an intent to harm. *United States v. Chandler*, 98 F. 3rd 711, 716 (2nd Cir. 1996) (defendant exposed bank to unwanted risk of loss by causing bank to deal with fictitious persona). However, since a mere showing of actual or potential harm is insufficient to establish an intent to harm, it is imperative to instruct the jury on the required intent to harm. *Id* and n. 3.

The First Circuit's holding in *Kenrick* has not been cited or followed by any other court.

1.B. Eliminating an intent to harm conflicts with Supreme Court precedents that an "intent to defraud" requires an intent to injure. Supreme Court Rule 10(c).

In *Hammerschmidt v. United States*, 265 U.S. 182, 188-189 (1924), this Court has discussed fraud focusing on wrongfulness and intent to injure.

> [T]he words "to defraud" as used in some statutes have been given a wide meaning, wider than their ordinary scope. They usually signify the deprivation of something of value by trick, deceit, chicane or overreaching. They do not extend to theft by violence. They refer rather to wronging one in his property rights by dishonest methods or schemes.... Intent to defraud [under a predecessor to the mail fraud statute] was satisfied by the wrongful purpose of injuring one in his property rights.... [Liability under that statute] should be confined to pecuniary or property injury inflicted by a scheme to use the mails for the purpose.

"'To defraud' commonly refer[red] 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signif[ied] the deprivation of something of value by trick, deceit, chicane or overreaching'" *McNally*, 483 U.S. at 358, *quoting, Hammerschmidt, id.*

1.C. Eliminating an intent to harm conflicts with legislative history.

The modern federal fraud statutes can be traced back to efforts to regulate lotteries and to prevent the use of interstate facilities such as the post office to promote lotteries. One of the earliest such statutes, Act of July 27, 1868, §13 (15 Stat. 196) provided that

> It shall not be lawful to deposit in a post-office, to be sent by mail, any letters or circulars concerning lotteries, so called gift concerts, or other similar enterprises, offering prizes of any kind, on any pretext whatever.

No specific penalty or punishment was imposed for a violation of this provision.

On December 7, 1870, as reported in The Congressional Globe 3rd Sess. 41st Congress, Part I (1871) p. 35-36, Congress was considering the re-enactment of a statue in the following terms:

> That it shall not be lawful to convey by mail, nor to deposit in a post office to be sent by mail, any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses, and any such letters or circulars shall be detained by the postmaster at the office of mailing or delivery, and disposed of under the instructions of the Postmaster General.

Congressman Brooks acknowledged that it should be unlawful to convey certain items through the mail. However, he moved to strike the final portion of the statute concerning detaining mail because this would "expose the correspondence of the people to a scrutiny and espionage of a most dangerous character." *Id.* The proposed amendment was allowed.

Congressman Sargent then proposed to strike out the entire provision because he questioned whether the provision could or should be enforced.

> [I]t has always been a dead letter for the reason that no penalty is provided for its enforcement.... There is no machinery provided by which the law can be executed, and it is very questionable whether it ought to be executed. I do not believe that the Post Office Department is intended to act as a censor upon the correspondence of the people.

Congressman Sargent argued that, since "gift concerts" were legal in many states, people should have the right to use the mail for such purposes unless there were "penalties attached to the offense" as well as a "method of espionage" by which prohibited mail could be identified. *Id.* Congressman Farnsworth responded:

> I do not think it wise to strike out this section; it is in the present law, and I am willing to let it stand for what it is worth. There is a great deal of this matter now transmitted through the mails. There are sections further along in the bill which have been incorporated into it by the Committee on the Post Office and Post Roads, and which are intended to pre-

> vent the frauds which are mostly gotten up in the large cities ... by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country.... [The Postmaster] ought, therefore, to be empowered in some way to ascertain the character of these letters, and to return the money to those who have been thus deluded into sending it. That, however, is not the reason for this section, though it is a reason for some of the subsequent sections of this bill. It certainly will do no harm to declare that it shall be illegal to send lottery and gift-concert circulars through the mails.

Upon the defeat of Congressman Sargent's proposal to strike the entire section, Congressman Brooks successfully proposed that a penalty of not less than $100 nor more than $500 with costs of prosecution be authorized. *Id.*

Congressman Sargent then proposed to strike the specific reference to "gift concerts." *Id.* He noted that some were being conducted for charitable purposes such as the relief of wounded or sick soldiers. Although he acknowledged that some states prohibited "gift concerts" along with all forms of gaming, he viewed at least some "gift concerts" as being "harmless in their design; they defraud no one."

> I deprecate as much as the chairman of the committee [Congressman Farnsworth] the frauds of those nefarious rascals who send out their circulars to entrap the unwary into purchasing counterfeit money; and if the penalty were restricted to schemes of that kind I

> would not object. But it seems to me that this provision, in so far as it applies to proceedings which are harmless, or which, at any rate, are pursued with a harmless intent, goes entirely too far.

There was no objection or response to this argument. The proposed amendment was defeated. *Id.* Congress then moved on, considering and defeating a proposal to reduce letter postage from three cents to two cents.

Although the bill being considered in 1870 was not passed by the 41st Congress, it was reintroduced and passed by the 42nd Congress, adding the word "illegal" as modifying the word "lotteries." Act of June 8, 1872, §§149 and 301 (17 Stat. 302 and 323):

> It shall not be lawful to convey by mail, nor to deposit in a post-office to be sent by mail, any letters or circulars concerning illegal lotteries, so called gift concerts, or other similar enterprises, offering prizes, or concerning schemes devised and intended to deceive and defraud the public, for the purpose of obtaining money under false pretences, and a penalty of not more than five hundred dollars, nor less than one hundred dollars, with costs of prosecution, is hereby imposed, upon conviction, in any federal court, of the violation of this section.

Soon thereafter, 3894 of the Revised Statutes, as amended by Act of July 12, 1876 §2 (19 Stat. 90) reversed the 1872 amendment, by removing the word "illegal."

The 1872 enactment is significant in that it introduced the phrase, "schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses." By using the words "deceive and defraud" conjunctively in the enacted legislation, Congress recognized that the two words were not synonymous, that an intent to deceive alone was insufficient, and that both an intent to deceive and an intent to defraud were required to constitute an offense.

Similarly, Congressman Farnsworth, by speaking of "deceiving and fleecing" conjunctively in discussing the legislation also indicated that deceit alone was not enough. His use of words such as "fleecing," as well as "thieves, forgers and rapscallions" indicated that Congress' intent was to address something more pernicious than deceit alone. This is underscored by Congressman Sargent's reference to "nefarious rascals who ... entrap the unwary."[5]

This legislative history is precisely contrary to the First Circuit's en banc holding that an "intent to defraud" is an "intent to deceive " in order to obtain money or property. (Pet.App. 17a).

1.D. Eliminating an intent to harm conflicts with common law which required proof of an intent to harm and which was not satisfied by proof of an intent to deceive.

Requiring the jury to find an intent to harm by wrongful means beyond a reasonable doubt as a

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[5] The defeat of Congressman Sargent's "gift concert" amendment is not to the contrary. There was no disagreement with Congressman Sargent's premise that the law should not prohibit "harmless" matters or those "pursued with a harmless intent."

blameworthy mental state in order to convict for criminal fraud is not a radical thought. At English common law, there was "unqualified acceptance" of the doctrine that any crime, including larceny-type offenses, required a "vicious will" or "concurrence of an evil-meaning mind with an evil-doing hand." *Morissette v. United States*, 342 U.S. 246, 250-252, 260-261 (1952).

An intent to harm was a well-established element of fraud at common law. Even the early treatise on torts cited by the First Circuit's en banc opinion (Pet.App. 16a) states that a "design to impose upon or cheat another" is a cardinal requirement for civil tort liability:

> An action can not be supported for the telling of a bare, naked lie, *i.e.*, saying a thing which is false, knowing or not knowing it to be so, and without any design to impose upon or cheat another, and without any intention that another should rely upon the false statement, and act upon it...

2 Charles G. Addison, A Treatise on the Law of Torts §1174, at 398 (H.G. Wood ed., 1881)[emphasis added][6]

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[6] The en banc opinion's further quote from Addison at 404 (Pet.App. 16a) is from the section dealing with "unintentional deception" and is, in any event incomplete. The complete quotation, which requires an intent "to induce another to act on the faith of it in such a way as that he may incur damage," makes clear that, even though there need not be a corrupt motive, there must be an intent to harm.

> It is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant, or a wicked motive of injury to

While common law tort concepts of civil fraud may not necessarily translate into common law crimes such as larceny by trick or false pretenses, as made clear in cases such as *Commonwealth v. Speer*, 4 Va. 65, 67 (1817), criminal liability at common law depended on proof of more than would support civil liability -- at least proof of injury beyond the individual as well as proof of scienter.[7]

Smith v Richards, 38 U.S. 26, 36 (1839), a civil case seeking to set aside a contract for fraud, set out the elements of fraud at common law as clearly including a requirement of an evil act and an evil intent to cause injury:

> In 1 Story's Equity, 201, 202, it is thus stated. "Where the party intentionally, or by design, misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him; in every such case there is a

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> the plaintiff; it is enough if a representation is made which the person making it knows to be untrue, and which is intended or calculated to induce another to act on the faith of it in such a way as that he may incur damage, and that damage is actually incurred.

[7] Similarly, in determining the propriety of punitive damages in civil cases, this Court has noted that "the punishment should fit the crime." Exemplary or punitive damages should not be awarded routinely, but should be reserved for extraordinary circumstances; and then should bear some relationship to the reprehensibility of the defendant's conduct. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 576-577 (1996). Since heightened blame is required to impose punitive damages in a civil case, even more heightened blame should be required in a criminal case where the penalty imposed is calculated in years rather than dollars.

> positive fraud, in the truest sense of the terms; there is an evil act, with an evil intent; dolum malum, ad circumveniendum. And the misrepresentation may be as well by deeds or acts, as by words; by artifices to mislead, as by positive assertions."

Dolum is the Latin word for deceit or artifice. Although there may be dolum or deceit without fraud, fraud always includes dolum. Dolum malum is bad or evil deceit based on an evil or fraudulent design or intent, intentional aggression, and willful injury to property. Black's Law Dictionary, 7th Ed. p. 499-500 (West, 1999)[8].

1.E. Eliminating an intent to harm conflicts with constitutional principles.

As most recently reaffirmed in *Apprendi v. New Jersey*, 120 S.Ct. 2348, 2356 (2000), the Constitution, especially the rights to jury trial guaranteed in Article III, §2 and the Sixth Amendment, as well as the right to due process of law guaranteed by Due Process Clause of the Fifth Amendment, a defendant in a criminal case is

> indisputably entitle[d] ... to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." United States v. Gaudin, 515 U.S. 506, 510 (1995); see also Sullivan v. Louisiana, 508 U.S. 275, 278 (1993); Winship, 397 U.S. at 364 (The Due Process

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[8] Black's Law Dictionary uses "defraud" and "cheat" synonymously. *Id* at 230; and defines "defraud" as "to cause injury or loss ... by deceit." *id* at 434.

> Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

Those requirements apply to the proof of a culpable mental state, including an intent to harm. Without a finding of an intent to harm, there has been no finding of a "vicious will" or "an evil-meaning mind" required by *Morissette*.

Moreover, the First Circuit's en banc definition of intent to defraud as "an intent to deceive in order to obtain money or other property" (Pet.App. 17a) boils down to simply an intent to deceive. This is incomplete and overbroad. *Carter v. United States*, 120 S.Ct. 2159, 2169 (2000) (presumption of scienter or heightened criminal intent required to avoid criminalizing legal conduct); *see also*, Wiley, "Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation," 85 Va. Law Rev. 1021 (1999) (The Supreme Court reads scienter into statutes because the Court assumes that Congress does not want morally blameless people -- those who have not been given a fair chance to know of and obey the law -- to be convicted of serious federal crimes.)

Virtually every commercial transaction involves parties who intend to obtain money or other property. A borrower intends to obtain the loan proceeds from a lender. The lender, in turn, intends to obtain repayment of principal and interest. A consumer intends to obtain food from a grocer. The grocer, in turn, intends to obtain payment. An investor intends to obtain a share in a company. The company, in turn, intends to obtain capital.

An intent to obtain money or property, even when coupled with intent to deceive, is not criminal intent sufficient to sustain a fraud conviction. There are many circumstances where a statement could be made or an act could be done with an intent to deceive but without any intent to harm. A minority loan applicant, wishing to avoid the possibility of racial discrimination, could intentionally and falsely disclaim any minority status. A married loan applicant, wishing to establish individual credit, could intentionally and falsely claim to be single. A loan applicant, wishing to avoid the possibility of overstatement, could intentionally and falsely under-represent income or undervalue collateral. While each of these cases may involve an intentional falsehood about something material to a lending decision, in none of these cases was any harm to the bank intended.

The number of such examples multiplies as the definition of "materiality" becomes broader.[9] Even if a lender unfortunately suffers a loss for reasons unrelated to any such false statement, that should not convert the statement into a thirty year felony or the loan applicant into a felon.

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[9] Traditionally, criminal cases had defined "materiality" as "having a natural tendency to influence, or [being] capable of influencing, the decision of the decisionmaking body to which it was addressed." *United States v. Wells*, 519 U.S. 482, 489 (1997). In *Neder v. United States*, 527 U.S. 1, 22 n. 5 (1999) the Court adopted a broader definition of materiality from civil tort law which would include situations where "the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it." *quoting* Restatement (Second) of Torts §§538 (1976). Justice Stevens' "crafty homeowner" who falsely complimented a loan officer on a bow tie which the homeowner secretly hated, *Wells, supra* at 513 n. 14, as well as many others, apparently could be convicted of bank fraud under *Neder*'s more expansive definition of materiality.

Under the rationale of the First Circuit's en banc opinion, civil litigants will not be constrained by prosecutorial discretion. Allegations of deceit without any intent to harm may form the basis of civil liability as predicate acts under the Racketeer Influenced and Corrupt Organizations statute, 18 U.S.C., §§ 1961, et seq.

Indeed, the First Circuit's en banc decision has finally eliminated any meaningful distinction between tort and crime. Coffee, The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White Collar Crime, 21 Am.Crim.L.Rev. 1 (1983); Coffee, From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics, 19 Am.Crim.L.Rev. 117 (1983).

Given the expansive nature of criminal liability under theories of attempt, conspiracy, joint venture, and aiding and abetting, apart from differing burdens of proof -- on which a jury need not be instructed, *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) -- it may be easier to prove a criminal fraud case than to establish ordinary civil liability. This, again, contravenes common law and the firmly entrenched notion that increased penalties should be based upon increased culpability.

Permitting liability to be based simply on an intent to deceive is too close to "do good; shun evil," which then-Chief Judge now-Justice Breyer endorsed as "sound moral advice, [but] not appropriate language for a criminal statute." *United States v. Barker Steel Co.,Inc.*, 985 F. 2nd 1136, 1137 (1st Cir. 1993).

1.F. Eliminating an intent to harm conflicts with the views of leading commentators.

"The critical consideration [in bank fraud cases] is whether the government has proven that the defendant intended to expose the bank to an actual or potential loss." Villa, Banking Crimes, Vol. 1, §7.02[3][a][i], p. 7-16 (1999).

After *McNally*, "a scheme intended to bring about some financial gain to the defendant without depriving the victim of some cognizable property interest is no longer sufficient." Sand, Siffert, Loughlin & Reiss, 2 Modern Federal Jury Instructions, p. 44-22 (1999) [emphasis original]. Judge Sand's suggested instruction 44-5 at p. 44-25 is:

> Intent to defraud means to act knowingly and with the specific intent to deceive, for the purpose of causing some financial or property loss to another.

Thus, Judge Sand cautions that the trial judge "should be careful to require an intended harm to the victim, and not merely an intent by the defendant to achieve financial gain himself." *Id.* p. 44-28. The trial judge in the Petitioner's case did not abide by Judge Sand's caution. In light of the First Circuit's en banc opinion, other trial judges in the First Circuit and elsewhere, similarly, will ignore Judge Sand and will remove intent to harm from the calculus required for a criminal fraud conviction.

2. In affirming the Petitioner's conviction, the First Circuit's en banc opinion conflicts with the harmless error limitations of *Neder v. United States*, 527 U.S. 1 (1999) and/or the due process concerns of *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000), engaged in improper appellate fact finding, and deprived the Petitioner of his constitutional rights to a jury finding of elements of the offense beyond a reasonable doubt. Supreme Court Rule 10(c)

While *Neder v. United States*, 527 U.S. 1, 18-19 (1999) held that failure to submit the element of materiality to the jury could be harmless, it addressed a much different case than the Petitioner's case. In *Neder* there had been a judicial finding of materiality in the trial court, albeit one made by a trial judge rather than by a jury; and the evidence on that issue was strong and had not been seriously contested. *Neder* cautioned that error in failing to submit an element such as materiality to the jury could not be harmless where the evidence was sufficient to support a contrary finding. *Id.*

In the petitioner's case, in contrast, there was no finding of materiality by either trial judge or jury by any quantum of evidence. The evidence led the trial judge to express at least reasonable doubts as to materiality: that the loans in question were "about par" with the bank's portfolio, that they were performing loans until the real estate market soured, and that the loans would have been made even if Ober had not taken steps to conceal his interest from the bank. (January 20, 1998 Trial Transcript 32, 33) Moreover, the jury, viewing the same evidence, found both the

Petitioner and Ober "not guilty" of the principal charges which had the same factual underpinnings.[10]

In these circumstances, an appellate court should not have made findings of fact in the first instance that the jury could have found a nondisclosure of a material fact by Ober. Insofar as this amounted to an appellate finding of criminal intent, the decision contravenes the due process principles of *Apprendi, supra.*

3. The First Circuit's en banc holding that a bank fraud conviction relating to a 1986 transaction could be upheld based on the alleged concealment by the Petitioner's co-defendant of a quid-pro-quo arrangement conflicts with *McNally v. United States*, 483 U.S. 350 (1987) and/or *Chaiarella v. United States*, 445 U.S. 222 (1979). Supreme Court Rule 10(c)

In *McNally*, 483 U.S. at 358, the Supreme Court required proof of a wrong to the victim's tangible property rather than to its intangible rights to honest services. This requirement was in place until 1988 when Congress enacted 18 U.S.C., §1346.

In the case of the 8-10 Emerson Street loan, the only charge on which the jury convicted the Petitioner, there was no wrong to the bank's tangible property caused by anything which either the Petitioner or Ober did or failed to do. The bank suffered a monetary loss only many years later for reasons that were un-

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[10] A more rigorous standard of review may be constitutionally required where verdicts are inconsistent since the jury apparently has in some respect violated its instructions. Muller, "The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts," 111 Harvard Law Review 771 (1998).

foreseeable and entirely unrelated to the loan transaction.

According to the First Circuit's en banc opinion, the alleged quid-pro-quo arrangement was the only material fact which allegedly was concealed from the bank and the only basis for a conviction. (Pet.App. 22a n. 15). However, the Petitioner's co-defendant's concealment of an alleged quid-pro-quo arrangement is indistinguishable from the theory of "honest services" fraud which was rejected in *McNally*. Since the events in question took place in 1986, before the enactment of 18 U.S.C., §1346, *McNally* applies and precludes the Petitioner's conviction.

Moreover, imposing liability on the Petitioner, who owed no fiduciary duty to the bank (Pet.App. 24a n. 17), conflicts with *Chiarella v. United States*, 445 U.S. 222, 232 (1979) in which this Court refused to find fraud based on a failure to disclose absent a duty to disclose.

CONCLUSION

The petition for a writ of certiorari should be granted because the First Circuit's en banc opinion stands in conflict with opinions of at least eight other circuits, opinions of this Court, legislative history, common law, constitutional principles, and commentators. Supreme Court review is necessary to re-establish uniformity of judicial opinions, fidelity to common law and constitutional principles, and a guarantee of substantive and procedural fairness in criminal fraud prosecutions.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
for the
FIRST CIRCUIT

98-1282, 98-1283
UNITED STATES, Appellee,

v.

ALBERT KENRICK, Defendant, Appellant.
DEREK OBER, Defendant, Appellant.

August 2, 2000, Decided

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.
[Hon. Douglas P. Woodlock, U.S. District Judge].

OPINION EN BANC

Before Torruella, Chief Judge, Selya, Boudin, Stahl, Lynch and Lipez, Circuit Judges, Coffin and Campbell, Senior Circuit Judges.

LIPEZ, Circuit Judge.

Albert Kenrick and Derek Ober appeal from judgments of conviction entered after a jury trial in the United States District Court for the District of Massachusetts. The jury found Kenrick guilty of one count of bank fraud and Ober guilty of four counts of bank fraud and one count of perjury. They argue, for the first time on appeal, that the district court erred in instructing the jury on the intent required for a bank fraud conviction. Although the panel that originally heard this case agreed with the defendants, it held

that there was no plain error warranting reversal. *See United States v. Kenrick*, 2000 U.S. App. LEXIS 2594, 98-1282, slip op. at 22, 33 (1st Cir. Feb. 22, 2000) (withdrawn). A majority of the circuit judges in active regular service ordered rehearing en banc and requested supplemental briefs on the intent issue. We now hold that, contrary to the defendants' argument and the earlier holding of the panel, "intent to harm" is not an element of bank fraud. We take this opportunity to clarify the nature of the intent element required for a bank fraud conviction. We also reject both defendants' challenges to the sufficiency of the evidence, as well as sundry arguments raised by Ober. We therefore affirm the convictions.

I. BACKGROUND

We recite the facts in the light most favorable to the jury's verdict. *See United States v. Escobar-de Jesus*, 187 F. 3rd 148, 157 (1st Cir. 1999). In 1986, at the height of "New England's late, lamented real estate boom," *United States v. Lilly*, 983 F. 2nd 300, 302 (1st Cir. 1992), Derek Ober was the president of the Wakefield Cooperative Bank ("WCB" or "the bank") in Wakefield, Massachusetts. WCB is a state-chartered bank that has been insured by the FDIC since January 1986. Albert Kenrick, a real estate investor with substantial property in eastern Massachusetts, who had done business with WCB in the past, had an incentive to sell real estate in which he had large gains before January 1, 1987, because of a pending increase in capital gains taxes.

A. 222 Stackpole Street

Among Kenrick's properties was an eighteen-unit apartment building at 222 Stackpole Street in Lowell, Massachusetts. Kenrick discussed with Emily Flynn, a real estate broker whom he had dated in the

past, the possibility of converting the building to condominiums and having Flynn sell them for him. Possibly contemplating the tax advantages of a sale before the end of 1986, however, Kenrick decided to sell the apartment building. Flynn had recently made a large profit on another condominium conversion, and she was interested in buying the Stackpole Street building with a partner. Although she wanted to have the same partner that she had had on her recent successful condo deal, Kenrick told her that Ober--whom Flynn had never met before--was interested in buying the property and that Kenrick preferred that Flynn and Ober purchase it as partners. On October 5, 1986, Flynn cooked a spaghetti dinner for Kenrick and Ober, and they negotiated a price for the Stackpole Street property of $935,000.

Flynn asked Ober where they could get financing for the purchase, and he answered, "Right here at this bank," i.e., WCB. Ober instructed Flynn that the loan application should be made in her name alone, even though they were equal partners, because he was going through a divorce. When she expressed doubt that she alone could qualify for such a large loan, he assured her that she could, and he filled out the application for her. Ober called John (Jay) Kimball, a lawyer who frequently represented WCB in mortgage transactions, and asked him to handle the paperwork for the Stackpole Street purchase. Kimball drafted the Riverview Development Trust, with Flynn as the trustee and only listed beneficiary, to hold title to the property. On Ober's instructions, Kimball also told Kenrick's attorney, who had drafted a purchase and sale agreement listing both Flynn and Ober as purchasers, that Flynn was to be listed as the only buyer.

An application for a $900,000 mortgage on the Stackpole Street property was filed with WCB. Pursuant to the standard procedure for mortgage applica-

tions at WCB, the applications went initially to Ober, who was both president and the bank's sole loan officer. The applications were then reviewed by two members of the Security Committee, a subcommittee of the Board of Directors, who set a value for the property, typically by visiting it themselves, without an outside appraisal. If approved by the Security Committee, loans would come before the Board of Directors at its monthly meeting for ratification. There was an unwritten policy that Board members should abstain from voting on loans in which they or their relatives had an interest.

Ober and another member of the Security Committee visited Stackpole Street, valued the property at $1,125,000, and recommended approval of the mortgage. The minutes of the Board of Directors meeting of November 26, 1986, indicate that the Board approved the Flynn loan. Three members of the Board, however, testified that the loan was never presented to them for a vote and that Ober never disclosed to them his interest in the property. An FBI document analyst testified that the entry in the Board minutes listing the loan was typed at a different time and with a different typewriter ball or wheel than the rest of the page.

The transaction closed on December 24, 1986. WCB provided a check for $900,000 and Flynn took title to the property as trustee of the Riverview Development Trust. Flynn herself provided the $50,000 down payment because Ober said he could not pay his half due to his pending divorce. The property was converted to condominiums, and seventeen of the eighteen units sold quickly, allowing Flynn to pay off the WCB loan in eight months. She shared the substantial profits equally with Ober, after repaying herself her contribution of his portion of the down payment. Ober assisted Flynn throughout the sales process, and

managed to sell several units to friends and acquaintances, most of whom financed their purchases through WCB mortgages.

The eighteenth unit was harder to sell. Title to that unit was transferred to another trust prepared by Attorney Kimball, the D & E Realty Trust. Ober told Kimball that he had an interest in the unsold unit. Kimball therefore prepared two statements of beneficial interest for the trust, one listing Flynn as 100% beneficiary and the other listing Ober as 100% beneficiary; according to Flynn, they were equal partners in D & E as in Riverview. Ober was present when the trust was executed. He received half the net income from D & E and dealt with a condominium owner whose unit was damaged by flooding in the unit owned by D & E.

From the beginning of the transaction, Ober took steps to conceal his interest in 222 Stackpole Street. He arranged that Flynn should take title from Kenrick in her name only, as trustee of the Riverview Development Trust, and that she should be listed as the sole borrower on the $900,000 loan from WCB to purchase the property. Ober had a motive to conceal his interest because, as the jury was told, a loan of that nature to a bank officer was forbidden by Massachusetts law. See Mass. Gen. Laws ch. 170, §19.[1] When Flynn was deposed by the attorney for the former Mrs. Ober, Ober instructed her to perjure herself by stating that he had no interest in the Stackpole Street property, and she did so. Before Flynn was questioned by the FBI, Ober told her, "I'll never admit to anything." Ober also denied his involvement in the

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[1] The jury was also told that the Federal Reserve Board's Regulation O required a bank officer to disclose his interest in a loan to the bank's board of directors and to abstain from voting on the loan. See 12 C.F.R. pt. 215.

Stackpole Street transaction at a 1991 WCB Board meeting.

B. 8-10 Emerson Street

At around the same time that he sold the Stackpole Street property, Kenrick sold a six-unit apartment building located at 8-10 Emerson Street in Wakefield to Chung Lee and her parents. The Lees were Korean immigrants who had formerly lived in a different building owned by Kenrick. They had purchased a two-family house on Willow Street in Melrose, Massachusetts, in 1983. Kenrick, who was dating Chung Lee, told her that he could teach her how to make a million dollars by investing in real estate. He suggested to her that she and her parents buy his Emerson Street building for $325,000. He advised financing the purchase with two loans from WCB: first, a $150,000 refinancing of the mortgage on the Willow Street property, which would provide money for the down payment, and then a $260,000 mortgage on 8-10 Emerson Street.

Although Chung Lee filled out an application for the Willow Street refinancing and filed it at WCB, it was not acted upon immediately. The original application was marked "Hold" in Ober's handwriting. After Kenrick met with Ober to negotiate the Stackpole Street sale, however, the refinancing was approved, with the commitment letter dated October 22, 1986. Kenrick himself filled out the application for the Lees' Emerson Street mortgage, and his appointment calendar indicated that he gave it to Ober personally on November 3, 1986. The Board of Directors ratified the Willow Street loan on November 26 and the Emerson Street loan on December 18. The sale of 8-10 Emerson Street closed on December 18.

As alleged by the government, there was evidence of a quid-pro-quo agreement between Kenrick and Ober that Kenrick would sell 222 Stackpole Street to Flynn and Ober and, in exchange, Ober would provide financing through the bank to allow Kenrick to sell 8-10 Emerson Street to the Lees. Following his spaghetti dinner meeting with Flynn and Ober on October 5, 1986, where they negotiated the Stackpole Street deal, Kenrick made a note that "I agreed at 935,000 to keep good rapport with Derek and thought with his financing ability & Emily's condo sales experience we could all be happy." In Kenrick's 1986 appointment calendar, otherwise filled with detailed notes for most days of the year, the page for October 4-6 is missing. Within three weeks of the October 5 meeting the loan to refinance the Lee family's property on Willow Street in Melrose, submitted to WCB in August and marked "Hold" in Ober's handwriting, had been approved; within two more weeks, the application for the $260,000 mortgage for the Lees to purchase 8-10 Emerson Street had been completed by Kenrick and delivered by him to Ober.

In addition, the agreement between Ober and Kenrick was testified to by Chung Lee. She testified that Kenrick told her, in explaining why he sold 222 Stackpole Street to Flynn and Ober, that "Mr. Ober can lend me the money because he's the Bank President. So, you know, that will work out very well." When asked what the relationship was between the Stackpole Street deal and Kenrick's sale of other properties, including 8-10 Emerson Street, she answered first, "Well, because if Bert [Kenrick] helps Derek Ober, Derek Ober can help Bert to sell other properties." When asked again what Kenrick had said about the relationship between the different deals, she answered:

> Because Bert sold it to Derek, Stackpole Street, that's why he can sell his Tuttle Street commercial properties. And 8-10 Emerson Street, he can sell. And he can also sell Methuen property at 175 Haverhill Street, for I think, a million dollars or $900,000. I cannot remember. But he can sell that because Bert help Derek Ober to make money. That way, you know, he can help Bert later.

Chung Lee married Kenrick in October 1988 and was still married to him at the time of trial in October 1997, although divorce proceedings were then pending. She and her parents continued to own the Emerson Street property, but had to obtain an additional loan from WCB to cover cash flow problems. Eventually, after the tenants were forced to move out when Chung Lee (now Chung Kenrick) contaminated the building in attempting to remove lead paint, she defaulted on the mortgage and filed for bankruptcy. The bank wrote off a loss of $119,645.84 on the Emerson Street mortgage.

C. DGB Realty Trust

In September 1985, Ober formed the DGB Realty Trust with WCB Treasurer Glenn Gates and William Upton, a retired local police officer. DGB bought three condominium units in Hudson, Massachusetts, and financed the purchases through Greater Boston Bank. DGB lost money from the start, and its checking account at WCB soon contained insufficient money to pay the trust's bills. To cover the shortfall, Ober decided to issue a demand loan from WCB to DGB for $15,000 on December 4, 1986. On December 11, 1987, the amount of the demand loan was increased to $25,000. Although there was testimony that some bank employees, and possibly some mem-

bers of the Board of Directors, knew of the interest of Ober and Gates in DGB, three directors testified that Ober did not disclose the demand loan to the Board. In January 1988, the DGB demand loan was paid off with the proceeds of a new demand loan in the name of William Upton. Although the new loan was in Upton's name alone, Ober and Gates were still each responsible for one-third of the debt. Ober and Upton paid off their shares, but Gates still owed money on his at the time of trial.

The demand loans did not turn DGB into a profitable venture, and on multiple occasions checks were written on DGB's account at WCB although there were insufficient funds to cover them. At that time WCB did not offer its customers overdraft protection or lines of credit. If a check was presented for payment with insufficient funds in the account, customers were typically allowed to make it good by depositing funds on the same day the check was presented; if they could not, the check bounced. Apparently checks were sometimes held for longer periods for bank employees or Board members. On Ober's instructions, however, DGB checks were held for unprecedented lengths of time, after the checks were paid and without sufficient funds in DGB's account to cover them. Fourteen checks, totaling over $36,000, were held for a total of 576 days; no checks bounced, and DGB payed no interest or fees. The last of these was the largest: check number 182, in the amount of $6,780.42, was presented for payment, and paid, on March 17, 1988, but there were insufficient funds in the DGB account to cover it until January 6, 1989.

D. Ober Deposition

The WCB Board of Directors fired Ober and Gates amid allegations of misconduct in 1991. In 1993, WCB brought an action against North American

Specialty Insurance Company to recover on a fidelity bond for losses to the bank allegedly caused by the fraudulent conduct of Ober, Gates, and Attorney Kimball. The suit was brought in Massachusetts Superior Court and removed by the defendant to the United States District Court for the District of Massachusetts. As a part of discovery in that action, Ober, then living in Florida, was deposed under oath on March 10 and 11, 1994. Ober was asked, "Now, Mr. Kimball drew a realty trust entitled D, ampersand, E Realty Trust, D & E Realty Trust. Are you familiar with that?" He answered, "No." Ober was also asked, "Did you ever participate in the making of a loan where you had an undisclosed interest?" He again answered, "No."

E. Procedural History

A federal grand jury issued a twenty-two count indictment against Kenrick and Ober on December 18, 1996. The indictment charged Kenrick with conspiracy, 18 U.S.C. §371, bank bribery, 18 U.S.C. §215(a), and three counts of bank fraud, 18 U.S.C. §1344. It charged Ober with conspiracy, bank bribery, seventeen counts of bank fraud, and two counts of perjury, 18 U.S.C. §1623. The case was tried to a jury from September 15 to October 27, 1997. The jury found Kenrick guilty on one count of bank fraud and Ober guilty on four counts of bank fraud and one count of perjury. They were acquitted on all other counts. This appeal followed.

II. JURY INSTRUCTIONS ON BANK FRAUD

Kenrick and Ober argue that the district court erred by failing to instruct the jury that they could not be convicted of bank fraud unless they intended to

harm WCB.[2] Because they failed to raise this objection before the district court, we review for plain error. *See United States v. Robbio*, 186 F. 3rd 37, 42 (1st Cir. 1999); Fed. R. Crim. P. 52(b).

The defendants were convicted of violating 18 U.S.C. §1344, which provides:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice—
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
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> shall be [subject to a specified maximum fine and term of imprisonment][3].

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[2] This argument was raised more clearly before the panel by Kenrick than by Ober, but Ober has joined in it in his supplemental brief before the en banc court. To the extent that Ober also makes a separate argument that the court erred by not requiring proof that the bank in fact lost money as a result of his conduct, he is clearly incorrect: section 1344 by its terms punishes not merely successful frauds, but any execution or attempted execution of a scheme to defraud a bank. *See Neder v. United States*, 527 U.S. 1, 24-25 (1999) (noting that common-law element of damages "plainly has no place in the federal fraud statutes"); *United States v. Blasini-Lluberas*, 169 F. 3rd 57, 65 (1st Cir. 1999) ("The government need not prove actual loss as a result of the scheme . . . .").

[3] For the sake of convenience we will refer to this current version of §1344, although the defendants were convicted under a previous version that was different in some ways not relevant here.

The defendants object to a portion of the district court's instruction defining a "scheme to defraud":

> A scheme to defraud is ordinarily accompanied by a desire or a purpose to bring about some gain or benefit to one's self [sic] or some other person or by a desire or purpose to cause some loss to some other person. Here, there is not alleged--effectively, there hasn't been any evidence offered--that there was an intent to cause a loss to some other person. Here, we're dealing with allegations that there was to be some benefit to Mr. Ober, to Mr. Kenrick, or to people that Mr. Kenrick was concerned about.

The court also separately defined "intent to defraud": "To act with intent to defraud means to act wilfully with a specific intent to deceive or cheat or for the purpose of either causing some financial gain to another or one's self [sic]."

The panel that first considered this case agreed with the defendants that intent to defraud necessarily includes an "intent to harm" the bank, and that the district court erred by omitting this requirement from its jury instructions. The panel further held that there was no plain error. After further consideration of the intent issue, the en banc court, including the panel members, arrives at a different conclusion about the meaning of intent to defraud. We now hold, for the reasons set forth below, that the intent necessary for a bank fraud conviction is an intent to deceive the bank in order to obtain from it money or other property.

The panel addressed the intent question in the terms that the defendants posed it--whether evidence of an intent to deceive a bank and to enrich oneself or

another person would support a bank fraud conviction without evidence of an intent to harm the bank. The panel's answer that proof of intent to harm was required was based on precedents from other circuits and an interpretation of the opinion of the Supreme Court in *McNally v. United States*, 483 U.S. 350 (1987), a case in which the Supreme Court held that the mail fraud statute does not reach "honest services" fraud.[4] By its terms, however, *McNally* does not require proof of "intent to harm" as an element of bank fraud, and there are no Supreme Court precedents that define the intent necessary for a bank fraud conviction. There is also no consensus among the circuits on the issue. Moreover, the "intent to harm" formulation of the panel contained an ambiguity that could not be dispelled easily.[5]

In arriving at our formulation of the intent necessary for a bank fraud conviction, we begin with the

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[4] In 1988 Congress overturned the holding of *McNally* by enacting 18 U.S.C. §1346, which defines "'scheme or artifice to defraud' [to] include a scheme or artifice to deprive another of the intangible right of honest services." Section 1346 is inapplicable here because the allegedly fraudulent acts in this case took place before its effective date.

[5] In common usage, "intent to harm" may well be understood to mean a motive to cause the bank an ultimate financial loss. Of course, a court could explain to a jury that intent to harm had nothing to do with a motive to hurt a bank, and could explain further that the panel's broad definition of "intent to harm" included depriving a bank of the right to control its assets by depriving it of the information needed to make discretionary economic decisions. Nevertheless, a juror who failed to grasp the subtlety of the explanation might easily believe that a defendant could not be convicted of bank fraud unless his desire was to injure the bank rather than to enrich himself, and thereby mistakenly acquit a defendant who clearly had an intent to harm in the broad sense defined by the panel, i.e., frustrating the bank's right to control the disposition of its assets.

language of the bank fraud statute. Because neither the indictment nor the jury instructions specified the subsection of §1344 under which Kenrick and Ober were charged, we must examine both subsections. Section 1344(2) specifies an intent requirement. It prescribes a punishment for "whoever knowingly executes, or attempts to execute, a scheme or artifice . . . to obtain any of the monies, funds, credits, assets, securities or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises."[6] This language boils down to a prohibition on schemes to obtain money or other property from a bank by specified means of deception. The particular means of deception chosen are not essential to the intent element, which can therefore be defined as an intent to deceive a bank in order to obtain from it money or other property. Nothing in the language of §1344(2) indicates that "intent to harm" is required.

The statutory text does not fully dispose of the intent question, however, because the specific language of §1344(2) cannot dictate the intent element of the general "to defraud" language of §1344(1). On the face of the statute, §1344(2) provides an alternative to, not a definition of, a "scheme or artifice to defraud" in violation of §1344(1). Nothing in the text of the statute requires that the intent element of §1344(1) be defined in the same way as the intent element of §1344(2) or, for that matter, that they be defined differently. Moreover, the Supreme Court said recently in *Neder v. United States*, 527 U.S. 1, 20 (1999), that "none of the fraud statutes defines the phrase 'scheme or artifice to

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[6] As the Supreme Court explained in *McNally*, this language and the nearly identical language in the mail and wire fraud statutes, 18 U.S.C. §§1341, 1343, dates to a 1909 amendment to the mail fraud statute. The prohibition of a "scheme or artifice to defraud" dates to the original 1872 enactment of the mail fraud statutes. *See McNally*, 483 U.S. at 356-59.

defraud.'" Yet *Neder* provides clear guidance on how to discern the elements of the scheme to defraud proscribed in §1344(1).

The *Neder* Court addressed the question of whether materiality is an element of a scheme to defraud under the mail, wire, and bank fraud statutes. Because the statutes do not define the elements of a scheme to defraud, the Court followed the "well-established rule of construction" that "Congress intends to incorporate the well-settled meaning of the common-law terms it uses." *Id.* at 21, 23. The use of the word "defraud" raises a "presumption that Congress intended to incorporate the common-law meaning of the term 'fraud' in the mail fraud, wire fraud, and bank fraud statutes." *Id.* at 23 n.7. Since the statutory text does not rebut the presumption that Congress intended to incorporate the common-law materiality element, the Court held that "materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes." *Id.* at 25.

Neder thus requires that we look to the common-law meaning of fraud in examining the intent element of a "scheme or artifice to defraud" in violation of §1344(1). The intent element of common-law civil fraud is well established. According to the Restatement, which the *Neder* Court relied on for its definition of materiality, see 527 U.S. at 22 n.5 (quoting Restatement (Second) of Torts §538 (1976)), "One who fraudulently makes a misrepresentation . . . for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit . . . ." Restatement (Second) of Torts §525 (1976); see also W. Page Keeton et al., Prosser & Keeton on the Law of Torts, §105, at 728 (5th ed. 1984) ("an intention to induce the plaintiff to act or refrain from action in reliance upon the misrepresentation" is an element of tort of deceit). Commentary roughly con-

temporary with the Congress that enacted the mail fraud statute in 1872 gives a similar definition of the intent element. "It is said that a man is liable to an action for deceit if he makes a false representation to another, knowing it to be false, but intending that the other should believe and act upon it . . . ." Oliver Wendell Holmes, Jr., The Common Law 132 (1881); see also 2 Charles G. Addison, A Treatise on the Law of Torts §1174, at 398 (H.G. Wood ed., 1881) ("If a falsehood be knowingly told, with an intention that another person should believe it to be true, and act upon it, ... the party telling the falsehood is responsible in damages in an action for deceit ....").

Common-law fraud thus requires an intent to induce action by the plaintiff in reliance on the defendant's misrepresentation. Commentators of the nineteenth and twentieth centuries agree that common-law fraud has no additional "intent to harm" requirement. See Prosser, supra, §107, at 741 (it is "well settled" that "intent to accomplish an ultimate purpose, as to benefit the speaker, or to cause harm to the one addressed," is "of no importance" except to punitive damages); 2 Addison, supra, §1174, at 404 ("It is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff ....").

The common-law element of intent to induce action by the plaintiff in reliance on the defendant's misrepresentation translates directly into the criminal bank fraud context, where a guilty defendant intends to induce the bank to act--i.e., to part with money or other property--in reliance on his deceit or misrepresentation.[7] Referring to an intent to induce reliance is

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[7] The government proposes a similar formulation, stating in its supplemental brief that "a person cannot commit [bank fraud] without at least intending that his fraudulent scheme cause the bank to part with money or other property."

potentially confusing to a jury, however, because it may erroneously suggest that actual reliance by the bank is also an element of the crime, as it is an element of common-law civil fraud. The Supreme Court has said that the common-law elements of justifiable reliance and damages "plainly have no place in the federal fraud statutes." *Neder*, 527 U.S. at 25. This potential for confusion is avoided by speaking simply of an intent to deceive the bank in order to obtain from it money or other property. We see no substantive difference between an intent to induce a bank to part with money in reliance on deceit or misrepresentation and an intent to deceive a bank in order to obtain from it money or other property.

The latter formulation is consistent with the text of §1344(2). It is also similar to language we have used in several cases. We have said, quoting an oft-cited Third Circuit case, that a bank fraud scheme must be "intended to deceive others in order to obtain something of value, such as money, from the institution to be deceived." *United States v. Brandon*, 17 F. 3rd 409, 424 (1st Cir. 1994) (*quoting United States v. Goldblatt*, 813 F. 2nd 619, 624 (3rd Cir. 1987));[8] accord *United States v. Colon-Munoz*, 192 F. 3rd 210, 221 (1st Cir. 1999); *United States v. Blasini-Lluberas*, 169 F. 3rd 57, 65 (1st Cir. 1999). Furthermore, this formulation plainly comports with *McNally*'s requirement that a scheme to defraud be directed at "wronging one in his property rights by dishonest methods or schemes."

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[8] Several other circuits have also quoted with approval the same language from *Goldblatt*, or its similar statement, 813 F. 2nd at 624, that "the bank fraud statute condemns schemes designed to deceive in order to obtain something of value." *See, e.g., United States v. Dobbs*, 63 F. 3rd 391, 395 (5th Cir. 1995); *United States v. Britton*, 9 F. 3rd 708, 709 (8th Cir. 1993); *United States v. Hammen*, 977 F. 2nd 379, 383 (7th Cir. 1992); *United States v. Cloud*, 872 F. 2nd 846, 850 (9th Cir. 1989).

483 U.S. at 358. We hold, therefore, that the intent element of bank fraud under either subsection is an intent to deceive the bank in order to obtain from it money or other property.[9] "Intent to harm" is not required.

Applying our holding to the jury charge in this case, we conclude that the instructions read as a whole, *see United States v. Robbio*, 186 F. 3rd 37, 42 (1st Cir. 1999), adequately conveyed the essence of the intent element. The district court told the jurors that "the term 'defraud' means to deprive another of something of value by means of deception or cheating." Given that instruction and the facts of this case, we are confident that the jury could not have found Kenrick and Ober guilty of bank fraud without finding that they intended to deceive WCB in order to obtain money from it. There was no plain error in the court's jury instructions.

We do not mean to imply, however, that the court's instruction or the pattern bank fraud instruction on which it was apparently based, see 1st Cir. Pattern Crim. Jury Instr. 4.14, is perfect. Although it may "ordinarily accompany" a scheme to defraud a bank, an ultimate "purpose of either causing some financial loss to another or bringing about some financial gain to oneself," *id.*, is not the essence of fraudulent intent. What counts is whether the defendant intended to deceive the bank in order to obtain from it money or other property, regardless of the ultimate purpose.

III. SUFFICIENCY OF THE EVIDENCE

Both defendants challenge the sufficiency of the evidence underlying their convictions. In reviewing

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[9] Of course, this element is not applicable in a case where the alleged fraud is the deprivation of the bank's honest services under 18 U.S.C. §1346.

this challenge, we ask "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Blasini*, 169 F. 3rd at 62.

A. Count 5 (Bank Fraud)

Ober was convicted of bank fraud on Count 5 for his involvement in the 222 Stackpole Street transaction. Kenrick was acquitted on the same count. To convict a defendant of bank fraud, the government must prove that he "(1) engaged in a scheme or artifice to defraud, or made false statements or misrepresentations to obtain money from; (2) a . . . financial institution; and (3) did so knowingly." *Brandon*, 17 F. 3rd at 424. The scheme must involve material falsehood, *see Neder*, 527 U.S. 1 at 25, and the defendant must have acted with an intent to defraud the bank, see *Brandon*, 17 F. 3rd at 425, which, as we have explained, is an intent to deceive the bank in order to obtain from it money or other property.

Viewing the record in the light most favorable to the government, there was ample evidence to convict Ober of bank fraud in connection with the 222 Stackpole Street transaction[10]. The jury could have found that Ober was Flynn's partner in purchasing 222

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[10] In the midst of his argument that the evidence on Count 5 was insufficient, Ober contends that the district court erred in admitting allegedly unreliable WCB documents. To the limited extent that his evidentiary arguments are developed enough to permit review, it is clear from our review of the record that the district court did not abuse its discretion in admitting the challenged evidence. *See United States v. Mitchell*, 85 F. 3rd 800, 812 n.11 (1st Cir. 1996).

Stackpole Street;[11] that he concealed his interest by, inter alia, causing Flynn to submit a loan application to WCB that falsely listed her as sole owner; that WCB made a $900,000 loan to finance the purchase without approval of the Board of Directors; and that someone falsified the Board minutes to make it appear that the Board had approved the loan. Considering Ober's interest in the transaction and his position as WCB president, the jury could infer that he caused the loan to be made and either altered the Board minutes himself or caused them to be altered.

The jury could further have concluded that Ober intended to deceive WCB in order to obtain the Stackpole Street loan. Furthermore, although not necessary for conviction, as we discuss below in connection with Count 4, the jury could have found--based on the size of the loan, the location of the property outside WCB's usual lending area, the speculative nature of the condominium conversion, Flynn's lack of history of business with WCB, and the fact that Ober's interest in the loan violated Massachusetts banking law--that WCB would not have made the loan if all the material facts had been revealed. A rational jury could have found Ober guilty beyond a reasonable doubt on Count 5.[12]

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[11] Ober argues that if he had an interest in the Stackpole Street property it was unenforceable under the statute of frauds. Even if he is correct, his significant financial interest in the transaction was still a material fact that he had a duty to disclose; its unenforceability does not preclude his conviction. *See United States v. Henderson*, 19 F. 3rd 917, 922-23 (5th Cir. 1994).

[12] We note that Ober's fraud was hardly novel. We have upheld the bank fraud convictions of bank insiders for making loans in which they had undisclosed interests. *See United States v. Mangone*, 105 F. 3rd 29, 31 (1st Cir. 1997) (credit union president); *United States v. Smith*, 46 F. 3rd 1223, 1226 (1st Cir. 1995) (credit union founder and general counsel). Other circuits have done the

B. Count 4 (Bank Fraud)

Ober and Kenrick were both found guilty of bank fraud in connection with the 8-10 Emerson Street transaction. The government's allegation as to this transaction was essentially that it was a separate execution of the same scheme to defraud WCB charged in Count 5.[13] The government alleged that Kenrick and Ober entered into a secret agreement whereby Kenrick would sell 222 Stackpole Street to Ober and Flynn, giving Ober the opportunity to make a large profit by converting the property to condominiums and Kenrick the chance to avoid the impending increase in the capital gains tax; in exchange, Ober would make financing available through WCB to Chung Lee and her parents to buy 8-10 Emerson Street, allowing Kenrick the same large tax advantage on that sale.

The evidence, especially Chung Lee's testimony[14], was sufficient to allow the jury to find that

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same. *See, e.g., United States v. Hanson*, 161 F. 3rd 896, 898 (5th Cir. 1998) (bank branch president); *United States v. Harvard*, 103 F. 3rd 412, 421 (5th Cir. 1997) (bank director); *United States v. Henderson*, 19 F. 3rd 917, 922-23 (5th Cir. 1994) (bank owner/board chairman); *United States v. Rackley*, 986 F. 2nd 1357, 1361 (10th Cir. 1993) (bank president); *United States v. Walker*, 871 F. 2nd 1298, 1307 (6th Cir. 1989) (bank president).

[13] "Under the bank fraud statute, 18 U.S.C. §1344, each execution of a scheme to defraud constitutes a separate indictable offense." *Brandon*, 17 F. 3rd at 422.

[14] Kenrick argues on appeal that the jury could not rationally find the alleged agreement between him and Ober because Chung Lee's testimony was not credible. This argument is unavailing because "credibility assessments are properly left to the jury." *United States v. Woodward*, 149 F. 3rd 46, 60 (1st Cir. 1998).

there was such a secret agreement.[15] Like the Stackpole Street mortgage, then, the Emerson Street mortgage was part of a scheme in which Ober deceptively took WCB's funds, and placed WCB at risk of loss, for his personal benefit. There were differences between the two executions of the scheme, of course. The benefit to Ober from Emerson Street was only indirect; he fraudulently obtained the money in the form of a loan to the Lees, not to himself, and he made no money from that transaction in isolation. The jury could have found, however, that he indirectly benefitted because the Emerson Street loan made possible the Stackpole Street purchase from which Ober garnered a substantial profit. The Emerson Street mortgage was approved by the WCB Board of Directors, but Ober never disclosed to them the existence of the secret quid-pro-quo agreement. Both loans benefitted Ober while exposing WCB to potential loss. No actual pecuniary loss resulted directly from the Stackpole Street loan, but the bank lost $119,645.84 when the Lees defaulted on the Emerson Street loan.

On appeal, Kenrick and Ober attempt to shift the focus from their nondisclosure of the secret agreement onto the financial status of the Lees. They argue that the Lees were creditworthy borrowers who would have been granted a loan in any event, and that this fact precludes conviction on Count 4. At least two

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[15] A finding that this quid-pro-quo agreement existed is necessary to sustain the convictions on Count 4 because, the government's arguments to the contrary on appeal notwithstanding, its existence is the one material fact that the defendants allegedly concealed from WCB with respect to the Emerson Street transaction. The jury's verdict on Count 4 may therefore be logically inconsistent with its verdict on Counts 1, 2, and 3, finding both defendants not guilty of conspiracy and bank bribery. Inconsistency of this sort, however, does not affect our analysis of the sufficiency of the evidence on the counts for which the defendants were convicted. *See United States v. Powell*, 469 U.S. 57, 67-69 (1984).

circuits have held, however, that the creditworthiness of the borrower is no defense to bank fraud when there is concealment of an insider interest in the transaction. *See United States v. Doke*, 171 F. 3rd 240, 245-46 (5th Cir. 1999); *United States v. Holley*, 23 F. 3rd 902, 909 (5th Cir. 1994); *United States v. Walker*, 871 F. 2nd 1298, 1307 (6th Cir. 1989).

Moreover, the defendants' argument misses the point in an important way. They mistake the character of the falsehood required for conviction by arguing, in effect, that it must have actually induced the bank to make a loan that would not otherwise have been made. On the contrary, to be criminally fraudulent a defendant's deceptive course of conduct must be material, *see Neder*, 527 U.S. at 25, and it must be directed at obtaining money or other property from the bank, but there is no requirement that it actually cause the bank to change its behavior, *see id.* at 24-25 ("The common-law requirements of 'justifiable reliance' and 'damages' . . . plainly have no place in the federal fraud statutes."). A falsehood can be material[16] even if it did not in fact induce the bank to alter its

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[16] According to the Supreme Court, [A] matter is material if:

> "(a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or
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> "(b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it."

Neder, 527 U.S. at 22 n.5 (quoting Restatement (Second) of Torts §538 (1976)).

conduct, although if such alteration did occur it is obviously probative of materiality. A misrepresentation about a borrower's creditworthiness can certainly be a material falsehood that supports a bank fraud conviction, but a different falsehood is also sufficient if it is material.

There was evidence that Kenrick and Ober had a secret quid-pro-quo agreement that gave Ober an indirect financial interest in the Emerson Street loan, and that Kenrick applied for the loan on the Lees' behalf and Ober approved it and presented it to the Board of Directors for ratification while concealing the material fact of that agreement. On the basis of that evidence, a rational jury could have found them both guilty beyond a reasonable doubt on Count 4.[17]

C. Counts 18 and 20 (Bank Fraud)

Ober was found guilty of two counts of bank fraud in connection with loans to the DGB Realty Trust, which Ober owned with Glenn Gates and William Upton. Count 18 concerned WCB's $15,000 demand loan to DGB, which was increased to $25,000 in December 1987, was never disclosed to or ratified by the Board of Directors, and was succeeded by a loan in the name of Upton that had not been paid off at the

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[17] The jury might have thought that Kenrick stood in a somewhat different position from Ober. Because he owed no fiduciary duty to WCB and had no power to cause it to make the loan, it could perhaps be argued that he did not himself execute the scheme to defraud. The bank fraud charge against Kenrick, however, was alternatively premised on an aiding and abetting theory. See 18 U.S.C. §2. Even if Kenrick did not execute the scheme, there was sufficient evidence that he "associated himself with the venture, participated in it as something he wished to bring about, and sought by his actions to make it succeed," *United States v. Colon-Munoz*, 192 F. 3rd 210, 223 (1st Cir. 1999), to find him guilty of aiding and abetting Ober's fraud.

time of trial. Count 20 concerned Ober's practice of having DGB checks paid, even though there were insufficient funds in the DGB checking account, and held for long periods until there was enough money in the account to cover them--thus essentially providing Ober and his partners with undisclosed interest-free loans. The indictment alleged, and the evidence showed, that one check in the amount of $6,780.42 was thus held for over nine months. The evidence was sufficient to find Ober guilty on both counts. Ober concealed from the Board the plainly material fact that he was putting bank assets in his own pocket by means of undisclosed loans that put the bank at significant risk of loss and that were eventually repaid either incompletely or without interest. In short, the evidence on these counts, like the evidence on Counts 4 and 5, suggested that Ober treated WCB as his personal piggy bank, the assets of which he felt free to dispose of by loans to himself, his associates, or their designees. On that basis a rational jury could have found Ober guilty of bank fraud as we have defined it above.

D. Count 22 (Perjury)

Ober was convicted of perjury for denying, under oath, that he was familiar with the D & E Realty Trust and that he had ever participated in making a loan in which he had an undisclosed interest. As recounted above, there was evidence that Ober was present when the D & E Realty Trust was executed, owned a half interest in it, and received half of its net income. There was also evidence that he participated in making undisclosed loans to the Riverview Development Trust and the DGB Realty Trust while having an interest in each trust. On the basis of that evidence, the jury could have concluded that both of Ober's statements--which he stipulated were material--were false and that he made them willfully. *See*

United States v. Cardales, 168 F. 3rd 548, 558 (1st Cir.), *cert. denied*, 120 S. Ct. 101 (1999) (elements of perjury are "falsity, materiality, and willfulness"). Although Ober now argues that the question whether he was "familiar with" the D & E Realty Trust was ambiguous, there was sufficient evidence to prove that his denial was false on any reasonable interpretation of the question.

IV. OBER'S DUE PROCESS CLAIMS

Ober raises two additional arguments, neither of which merits extended discussion. He contends first that he was denied due process as a result of the government's alleged delay in seeking an indictment on the bank fraud charges for approximately three years after its investigation was completed. To succeed on such a claim, a defendant must demonstrate "that the preindictment delay caused him actual, substantial prejudice [and] that the prosecution orchestrated the delay to gain a tactical advantage over him." *United States v. Stokes*, 124 F. 3rd 39, 47 (1st Cir. 1997) (*citing United States v. Marion*, 404 U.S. 307, 324 (1971)). Ober can show neither; instead, he offers only "mere speculation and bare allegations," which are clearly insufficient to make out a due process violation. *United States v. McCoy*, 977 F. 2nd 706, 711 (1st Cir. 1992).

Ober also argues that the district court violated his due process rights by preventing him from recross-examining an expert witness, appraiser Calvin Hastings, called by Kenrick to testify to the value of 222 Stackpole Street. The court barred Kenrick from conducting a redirect examination of Hastings as a sanction for Kenrick's failure--which was not discovered until the government's cross-examination--to disclose Hastings's report to the government. The court permitted Ober's attorney, who had already cross-examined

Hastings, to begin recross, with instructions that it be limited to the scope of the government's cross-examination. When Ober's attorney began by asking Hastings whether he had expected he would be cross-examined on the report, the court interrupted him, stopped the examination, and excused the witness. Ober neither objected nor made an offer of proof.

The district court has "extensive discretion" in controlling recross-examination. *United States v. Sorrentino*, 726 F. 2nd 876, 885 (1st Cir. 1984). Here the court stopped the recross because it concluded that Ober's attorney did not intend to re-examine Hastings on matters within the scope of the government's cross, but instead to conduct, in effect, the redirect that Kenrick's counsel could not. This is exactly the sort of judgment call that we should not second-guess. Considering that Ober had already had an opportunity to cross-examine Hastings, the court's limitation of his recross-examination was not an abuse of its extensive discretion, let alone a due process violation.

Affirmed.